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No. 85-1946

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JEFFERSON N. MARSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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EDITOR'S NOTE

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Petitioner argues that the loss of the pretrial statements of the government's witnesses requires the exclusion of their testimony at trial under the Jencks Act, 18 U.S.C. 3500(d).

1. Petitioner, a member of the United States Army, was tried by a general court-martial at Stuttgart, Germany, and was convicted of assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 928. He was sentenced to one year's confinement, total forfeiture of pay and allowances for one year, and a reduction in rank. The convening authority reviewed the case and approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 13a-18a). The Court of Military Appeals affirmed the decision of the Court of Military Review (Pet. App. 1a-12a; 21 M.J. 445).

a. The evidence at trial showed that shortly before midnight on September 15, 1980, petitioner assaulted Private Sharon Booker in her barracks room and stabbed

her in the neck with a knife (Tr. 196-197, 203, 228-229). Before she was stabbed, Private Booker and petitioner had been involved in a swearing match stemming from petitioner's accusation that Private Booker was responsible for petitioner's duty reassignment (Tr. 196, 218).

b. Before trial, an investigation was conducted pursuant to Article 32 of the UCMJ, 10 U.S.C. 832.[1] The investigation was tape recorded. Private Booker and Military Police Investigator Cochran testified at the hearing; petitioner and his counsel were present, and counsel cross-examined Booker and Cochran (Tr. 18, 39). After the hearing, petitioner's counsel asked the clerk responsible for recording the hearing to preserve the tapes, so that he could use them at trial (Pet. App. 3a, 15a). It was the policy of that office to preserve any tapes of Article 32 investigations (*id.* at 12a; Tr. 25, 27), and the tapes were marked and stored so that they would not be reused (Tr. 24-27). The tapes were discovered missing, however, when defense counsel asked for them a week before trial (Tr. 25). The clerk and another soldier then conducted an extensive search for the tapes, but were unable to find them (Tr. 26). The clerk who had recorded the hearing, however, had prepared a summarized transcript of the hearing. According to the clerk, the transcipt was an

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[1] No charge or specification may be referred to a general court-martial until an investigation has been conducted in compliance with Article 32. At the investigation, an accused is entitled to be represented by counsel and to have available witnesses produced to give testimony under oath. An accused may present any evidence he chooses, either in defense or in extenuation and mitigation. Under current procedure, a verbatim transcript of Article 32 testimony is generally not required; instead, the testimony is summarized. Rule 405(h)(1)(A) (Discussion), *Manual for Courts-Martial, United States – 1984*, at II-41. If substantially verbatim notes of testimony are taken, or if the testimony is recorded, however, the notes and recordings must be preserved until the end of any subsequent trial. *Ibid.*

"almost word for word" account of the proceedings (Tr. 24). This summarized transcript was given to the defense.

At the outset of the trial, petitioner's counsel objected to the testimony of any witness who had testified at the Article 32 investigation. He argued that the witnesses' testimony should be excluded, because the tapes of the Article 32 investigation were not available for his use at trial (Tr. 13). The trial judge denied the motion on the ground that petitioner had not shown that he had been prejudiced (Tr. 142). Petitioner renewed his motion during trial, and the trial judge again denied it (Tr. 212, 244).

At trial, defense counsel cross-examined Private Booker at length about her recollection of her testimony at the Article 32 investigation in an attempt to point out inconsistencies between her testimony at the hearing and her trial testimony (Tr. 221-225, 230-233). Investigator Cochran also testified at trial, and defense counsel was permitted to impeach Cochran with Cochran's initial sworn statement, his testimony at the Article 32 investigation, and his testimony at the pretrial hearing on petitioner's Jencks Act motion (Tr. 247, 251).

c. The Army Court of Military Review rejected petitioner's argument that the trial testimony of Booker and Cochran should have been stricken because the government failed to preserve the tape recordings of the Article 32 investigation (Pet. App. 15a-16a). The court found that the tapes were negligently lost (*id.* at 16a), but the court noted that the summarized transcript of the investigation that was provided to defense counsel was "an accurate and substantially complete rendition of the hearing" (*id.* at 15a-16a). Under those circumstances, the court found that petitioner was not prejudiced by the loss of the tapes (*id.* at 16a).

d. The Court of Military Appeals agreed that there was no evidence that the government had intentionally withheld or destroyed the tapes, or that the government had been grossly negligent in caring for them (Pet. App. 11a-12a). The court further found that the summarized transcript provided to petitioner was an almost verbatim account of the investigation, and that the loss of the tapes did not significantly hamper petitioner's ability to cross-examine the two witnesses at trial (*id.* at 12a).

2. The Jencks Act, 18 U.S.C. 3500(b), requires the government to provide the defendant with any statement made by the witness relating to the subject matter of his testimony. Although Subsection (d) of the Act authorizes a court to strike the witness's testimony if the government fails to comply with the requirements of the Act, the courts have uniformly concluded that a trial court is not required in every case to strike the testimony of a witness whose statements have not been turned over to the defense. Rather, trial courts have the discretion to formulate an appropriate remedy. In deciding whether to grant relief, the courts are required to consider both the degree of the government's culpability for the loss and the extent to which the defendant has been prejudiced. *E.g.*, *United States* v. *Gotchis*, No. 86-1139 (2d Cir. Oct. 14, 1986), slip op. 6231; *United States* v. *Balistrieri*, 779 F.2d 1191, 1220-1221 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986); *United States* v. *Moeckly*, 769 F.2d 453, 464 (8th Cir. 1985), cert. denied, No. 85-1083 (May 5, 1986); *United States* v. *Echeverry*, 759 F.2d 1451, 1456 (9th Cir. 1985); *United States* v. *Tashjian*, 660 F.2d 829, 839 (1st Cir.), cert. denied, 454 U.S. 1102 (1981); *United States* v. *Pope*, 574 F.2d 320, 322-327 (6th Cir.), cert. denied, 439 U.S. 868 (1978); *United States* v. *Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971).

The rulings by the military appellate courts in this case are fully consistent with those principles. The courts found that the government was, at most, negligent in losing the tapes and that the government made a good faith effort to recover them once it learned that they were missing (Pet. App. 12a, 16a, 17a). Petitioner does not claim that the government deliberately destroyed the tapes or acted in bad faith (see Tr. 35), and there is no evidence in the record that would support such a claim.

In addition, both appellate courts found that petitioner was not prejudiced by the loss of the tapes (Pet. App. 12a, 16a). That finding is clearly correct. The tapes were the recordings of a proceeding at which both petitioner and his trial counsel were present. A summarized transcript of the proceeding was prepared and provided to petitioner in a timely fashion. The summarized transcript was an almost verbatim account of the proceeding. And petitioner's cross-examination of Booker and Cochran was not materially hampered by the loss of the tapes. Contrary to petitioner's claim (Pet. 8-9), he was not surprised or unprepared at trial, and he was able to conduct a complete and effective cross-examination of Booker.[2] Because petitioner's counsel had essentially the same information he would have possessed if the tapes had not been destroyed,

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[2] Defense counsel cross-examined Booker at length concerning the differences between her testimony at the Article 32 investigation and her testimony at trial (Tr. 221-225, 230-233, 237-238). For instance, defense counsel sought to impeach Booker by establishing an inconsistency between her Article 32 testimony and her trial testimony regarding the time of the assault (Tr. 221-225, 238). Defense counsel also made the same point through the testimony of several defense witnesses (Tr. 273, 278). Booker also testified at trial that, immediately after the assault, petitioner stated, "Booker, I didn't kill you this time, but we'll bump heads again. Make sure you tell Sergeant Franklin that" (Tr. 197, 206). At trial, petitioner was able to reveal that Booker had not mentioned during the Article 32 investigation that petitioner had referred to Sergeant Franklin (Tr. 237-238).

the failure to produce the tapes does not require reversal. *Rosenberg* v. *United States*, 360 U.S. 367 (1959).

The cases cited by petitioner (Pet. 5-6 n.3) are not to the contrary. None of them adopted a per se rule that a witness's testimony must be struck whenever Jencks Act statements are lost or destroyed. In *United States* v. *Carrasco*, 537 F.2d 372, 377-378 (9th Cir. 1976), the court reversed the defendants' convictions because it concluded that the DEA agents' interview reports that were given to the defense were not comparable to the witness's diary that had been destroyed. Similarly, in *Lee* v. *United States*, 368 F.2d 834, 837-838 (D.C. Cir. 1966), and *United States* v. *Lonardo*, 350 F.2d 523, 527-529 (6th Cir. 1965), the courts found that the destruction of the witness's statements was not harmless on the facts of those cases. In the other cases cited by petitioner, the courts refused to reverse the convictions despite the loss or destruction of evidence.[3] The circuits that decided *Carrasco, Lee*, and *Lonardo* have since made clear that a trial court must consider both the government's culpability and the degree of prejudice to the accused in determining what, if any, sanction to impose for the failure to provide Jencks Act materials to the defendant. *United States* v. *Echeverry*, 759 F.2d at 1456; *United States* v. *Sterling*, 742 F.2d 521, 524-525 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Pope*, 574 F.2d at 322-327; *United States* v. *Bryant*, 439 F.2d at 651.

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[3] In *United States* v. *Bufalino*, 576 F.2d 446, 450 (2d Cir.), cert. denied, 439 U.S. 928 (1978), the court declined to reverse the defendant's conviction, even though the government had deliberately destroyed taped conversations the defendant had with an informant, because the defendant was not prejudiced by the loss of the evidence. In *United States* v. *Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976), the court found that an FBI agent's failure to preserve his rough notes of an interview was harmless because there was no showing that the final report given to the defendant differed from the agent's rough notes or that the agent lied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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